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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1235.

RUDGER CLAWSON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED DECEMBER 3, 1884.

1 TERRITORY OF UTAH, } ss:
Salt Lake County, }

To the hon. the supreme court of the Territory of Utah.

The petition of Rudger Clawson respectfully shows:

That your petitioner is now imprisoned and in the actual custody of E. A. Ireland, United States marshal for the Territory of Utah, at the penitentiary in said county of Salt Lake.

That the cause of such imprisonment and the facts concerning the same are:

That by the verdict of a jury the petitioner was convicted, on the 25th day of October, 1884, of the crimes of polygamy and unlawful cohabitation, charged in separate counts of the same indictment, in the district court for the third judicial district of Utah, and on the 3d day of November, A. D. 1884, the petitioner, by the judgement of the court upon said verdict, was sentenced, in substance, on the conviction for polygamy, to pay a fine of five hundred dollars and to be imprisoned for the term of three years and six months, and
2 *and* on the conviction for unlawful cohabitation to pay a fine of three hundred dollars and be imprisoned six months.

That on the same day your petitioner filed in the office of the clerk of said court a notice of appeal to the supreme court of the Territory of Utah, from the whole of said judgement, and served a copy of said notice on the United States district attorney for Utah Territory, and the Hon. Chas. S. Zane, chief justice of said Territory of Utah, and the judge before whom said case was tried made his certificate that in his opinion there was probable cause for said appeal, and the petitioner filed the same in the office of the clerk of said third district court, and in all respects perfected his appeal and a suspension of judgement pending the same.

That on said 3d day of November, 1884, the petitioner also applied to the judge of the said third district court, before
3 whom said conviction was had and by whom said judgement was rendered, to be let to bail pending said appeal, but the said judge refused to let petitioner to bail, or to fix any amount in which he would be permitted to give bail, and on said motion held and decided that the petitioner should not be let to bail pending said appeal, and petitioner's motion for bail was denied. That petitioner was ready and willing, and still is ready and willing, and offers to give an undertaking, with good and sufficient sureties, in such sum as the court may deem adequate to secure petitioner's surrender in execution of said judgement, and in all respects conditioned as provided by law. That upon denial of petitioner's motion for bail pending his said appeal, he was remanded to the custody of the said United States marshal, who from thenceforth has imprisoned and still imprisons him as aforesaid under an order of commitment, a copy of which is hereto annexed, and marked Exhibit "A," and made a part of this petition. That to the best of the
4 knowledge, information, and belief of your petitioner the said order of commitment, marked Exhibit "A," is the sole and

only cause and authority for the detention and imprisonment of petitioner, and that said marshal has and claim no other warrant or authority for such detention and imprisonment.

And your petitioner, upon his information and belief, alleges that his said imprisonment is illegal in this, that your petitioner has been and is able and now offers to give bail pending his appeal in such sum as the court may reasonably determine; and that as a matter of right, and in the sound exercise of a legal discretion, the petitioner is entitled to bail pending the hearing and determination of said appeal.

Petitioner, therefore, prays that a writ of *habeas corpus* may issue to the said E. A. Ireland, as United States marshal for Utah, that your petitioner may be brought before this court and let to
5 bail in such sum as the court may deem reasonable and adequate.

RUDGER CLAWSON.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

Rudger Clawson, being duly sworn, says: I am the petitioner named in the foregoing petition, and know the contents thereof; said petition and the matters therein stated are true of my own knowledge, except as to matters stated on information and belief, and as to those matters I believe it to be true.

RUDGER CLAWSON.

Subscribed and sworn to before me, Nov. 8th, 1884.
[SEAL.] NEPHI W. CLAYTON,
Notary Public.

6 *Exhibit "A" to Petition of Rudger Clawson.*

In the Third District Court of Utah Territory, Salt Lake County.

THE UNITED STATES }
vs. } Polygamy, &c.
RUDGER CLAWSON. }

The court having passed its sentence herein upon the defendant, the defendant now moves that bail be fixed, pending the appeal herein, and the motion is argued by counsel; and the court having now considered the same, and the court being of the opinion that the defendant ought not to be admitted to bail, after conviction and sentence, unless some extraordinary reason therefor is shown, and there being no sufficient reason shown in this case, it is ordered that the motion and application for bail be, and the same is hereby, denied, and the defendant be remanded to the custody of the United States marshal.

Nov. 3d, 1884.

7 Endorsed: Supreme court Utah Territory. *In re* Rudger Clawson. Petition for *habeas corpus*. Filed Nov. 10th, 1884. E. T. Sprague, clerk.

8 MONDAY, *November 10th*, A. D. 1884.

A session of the supreme court of Utah Territory was held this day, beginning at 2 o'clock p. m., pursuant to adjournment. The court was duly opened.

* * * * * *

Ex parte RUDGER CLAWSON, on Application for *Habeas Corpus*.

On application in that behalf, filed this day, it is hereby ordered that writ of *habeas corpus* issue, returnable the 14th day of November, instant, at 10 o'clock a. m.

9 TERRITORY OF UTAH, }
Salt Lake County, } *ss*:

To E. A. Ireland, United States marshal for Utah:

You are commanded to have the body of Rudger Clawson, by you obtained as alleged, before the supreme court of the Territory of Utah, at the court-room, in the Wasatch Building, in Salt Lake City, in said Territory, at 10 o'clock a. m. on the 14th day of November, 1884, after being served with this writ, to be dealt with according to law, and to abide such order as the court shall make in the premises, and have you then and there this writ, with a return of your doings in the premises.

Witness the Hon. Chas. S. Zane, chief justice of the supreme court of Utah Territory, the 10th day of November, A. D. 1884, and the seal of said court.

[SEAL.] E. T. SPRAGUE,
Clerk of Sup. Court.

The foregoing writ is allowed by the court, November 10th, 1884.

C. S. ZANE,
Chief Justice Supreme Court, Utah.

10 SHERIFF'S OFFICE, SALT LAKE, UTAH TER.

I hereby certify and return that I served the within writ of *habeas corpus* on the within-named E. A. Ireland, United States marshal for Utah, personally, at the county of Salt Lake, Utah Territory, on the 10th day of November, A. D. 1884, by delivering to and leaving with him, the said E. A. Ireland, the original writ of *habeas corpus* issued in this case, and of which the within is a true copy.

Dated this 13th day of Nov., A. D. 1884.

JOHN A. GROESBACK,
Sheriff of Salt Lake County, Utah Territory.

[Endorsed:] *In re* Rudger Clawson. Writ of *habeas corpus*. By the *habeas corpus* act. C. S. Zane, chief justice sup. c't, Utah Territory. Let the within writ be served by the sheriff of Salt Lake county. C. S. Zane, chief justice sup. c't, Utah Territory.

11 *Return of E. A. Ireland, U. S. Marshal, to the Writ of Habeas Corpus hereunto annexed.*

In the Supreme Court, Territory of Utah.

In obedience to the writ of *habeas corpus* hereunto annexed, I, E. A. Ireland, U. S. Marshal, do hereby certify and return to the hon. the supreme court of Utah Territory, that before the coming to me of said writ, to wit, on the 10th day of November, 1884, said Rudger Clawson, mentioned in said writ, was placed in my custody by virtue of a commitment issued out of the district court of the 3d judicial district of Utah Territory, a true copy of which is hereunto annexed, and that the said Rudger Clawson is now in my custody, under and by virtue of said commitment; all which I certify, and I have here the body of said Rudger Clawson, as by said writ I am commanded.

Nov. 14, 1884.

E. A. IRELAND,
U. S. Marshal,
By J. W. GREENMAN, *Deputy.*

12 In the Third District Court of Utah Territory, Salt Lake County.

THE UNITED STATES
vs.
RUDGER CLAWSON. } Polygamy, &c.

The court having passed its sentence herein upon the defendant, the def't now moves that bail be fixed pending the appeal herein, and the motion is argued by counsel, and the court having now considered the same, and the court being of opinion that the defendant ought not to be admitted to bail after conviction and sentence, unless some extraordinary reason therefor is shown, and there being no sufficient reason shown in this case, it is ordered that the motion and application for bail be, and the same is hereby, denied, and the defendant remanded to the custody of the United States marshal.

Nov. 3d, '84.

[SEAL.]

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

13 I, John M. Zane, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original order made and entered in said case by said court, Nov. 3d, 1884, in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 14th day of Nov., A. D. 1884.

[SEAL.]

J. M. ZANE, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

14 FRIDAY, *November 14th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. * * * Court was duly opened.

* * * * * * *

Ex Parte RUDGER CLAWSON on *Habeas Corpus.*

This matter was argued by Mr. Kirkpatrick for petitioner, Mr. Dickson contra, and Mr. Rawlins in reply. Submitted and taken under advisement.

SATURDAY, *November 15th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day, beginning at 2 o'clock p. m., pursuant to adjournment. Present and presiding, the Hon. Chas. S. Zane, chief justice; present also, the Hon. S. P. Twiss, associate justice; the clerk, marshal, and members of the bar. Court was duly opened.

* * * * * * *

Ex Parte RUDGER CLAWSON on *Habeas Corpus.*

15 In this matter, the court being sufficiently advised, it is hereby ordered and adjudged that the application for the discharge of the petitioner on bail be and is overruled and denied, the petition herein dismissed, and petitioner remanded to the custody of the United States marshal.

To this order counsel of petitioner except, and petitioner, by his counsel, prays the allowance of an appeal therefrom to the Supreme Court of the United States, and asks that the amount of a bond for costs to be given thereon be now fixed; whereupon it is further ordered that the appeal so prayed be, and is hereby, allowed, and the amount of said bond be and is fixed at $200.00.

16 *In re* of RUDGER CLAWSON, Appellant.

Appeal to the Supreme Court of the United States from Judgment on *Habeas Corpus.*

Know all men by these presents that we, Henry Dinwoodey and Hiram B. Clawson, Jr., both of Salt Lake City, in the Territory of Utah, are held and firmly bound unto the United States of America in the full and just sum of two hundred dollars, to be paid to the United States of America, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 18th day of November, A. D. 1884.

Whereas lately, at a term of the supreme court of the Territory of Utah, held in the city of Salt Lake, in said Territory, on the 15th day of November, A. D. 1884, in a matter pending in said court on *habeas corpus*, wherein the said Rudger Clawson was petitioner, judge-

ment of said court therein was rendered against the said
17 Rudger Clawson, denying his petition for bail and a release from imprisonment, and remanding him to custody and imprisonment; and the said Rudger Clawson having taken an appeal from said judgement, which was duly allowed, and having obtained a citation directed to the United States of America admonishing them to be and appear before the Supreme Court of the United States:

Now, the condition of this obligation is such, that if the said appellant, Rudger Clawson, shall prosecute his appeal to effect and answer all damages and costs if he shall fail to make his appeal and plea good, then this obligation to be void; else to remain in full force and effect.

H. DINWOODY. [SEAL.]
H. B. CLAWSON, JR. [SEAL.]

Sealed and delivered in the presence of—
GEORGE D. KEATON.
ISAAC A. CLAYTON.

The foregoing bond is approved by me, November 18th, 1884.

C. S. ZANE,
Chief Justice of the Supreme Court, Utah Territory.

17½ [Endorsed:] In the supreme court of the United States. *In re* of Rudger Clawson, appellant. Bond. Filed Nov. 18th, 1884. E. T. Sprague, clerk.

18 *In re* of RUDGER CLAWSON, Appellant.

Appeal from Judgment on *Habeas Corpus.*

The United States of America to The United States of America, Greeting:

You are cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1885, pursuant to an appeal duly taken herein by the appellant from the judgment herein rendered in the supreme court of the Territory of Utah on the 15th day of November, 1884, refusing to bail the appellant, and remanding him to imprisonment, to show cause, if any there be, why the said judgment should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Charles S. Zane, chief justice of the supreme court of Utah Territory, the 18th day of November, 1884.

C. S. ZANE,
Chief Justice of the Supreme Court, Utah Territory.

19 [Endorsed:] In the Supreme Court of the United States. *In re* of Rudger Clawson, appellant. Citation. Due service of a copy of the within admitted this 18th day of November, 1884. W. W. Dickson. U. S. dist. att'y. Filed Nov. 18, 1884. E. T. Sprague, clerk.

20 TERRITORY OF UTAH, *County of Salt Lake:*

In pursuance of an appeal, in the matter of Rudger Clawson on *habeas corpus*, from the judgment of the supreme court of said Territory of Utah, I, E. T. Sprague, clerk of said court, herewith return to the Supreme Court of the United States a transcript of the record and proceedings in and of said supreme court of Utah Territory in said matter, also of the bond on appeal, with the original citation therein, and I hereby certify that the annexed transcript of said record and proceedings and said bond is a true, full, correct, and completed copy of the several originals thereof on file or of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court of Utah Territory, at Salt Lake City, this 19th day of November, 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1235. Rudger Clawson, appellant, *vs.* The United States. Filed 3rd December, 1884.

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Appeals.

Extracts from the Criminal-Practice Act of Utah, approved February 22, 1878.

Sec. 358. Either party in a criminal action, may appeal to the Supreme Court on questions of law alone, as prescribed in this chapter.

Sec. 360. An appeal may be taken by the defendant:

1. From a final judgment of conviction;

2. From an order denying a motion for a new trial;

3. From an order made after judgment, affecting the substantial rights of the party.

Sec. 362. An appeal from a judgment must be taken within one year after its rendition, and from an order within sixty days after it is made.

Sec. 363. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.

Laws of Utah, 1878, p. 137.

Habeas Corpus.

Extract from Section 9 of an Act of Congress, entitled "An Act to establish a Territorial Government for Utah," approved September 9, 1850.

"*And be it further enacted*, That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * A writ of error or appeal, shall also be allowed to the Supreme Court of the United States, from the decisions of the said supreme court created by this act, or of any judge thereof, upon any writ of *habeas corpus* involving the question of personal freedom; * * * and the said supreme and district courts of the said Territory, and the respective judges thereof, shall and may grant writs of *habeas corpus* in all cases in which the same are granted by the judges of the United States in the District of Columbia."

Extracts from the Habeas Corpus Act of Utah.

"AN ACT in relation to writs of *Habeas Corpus*," approved February 2, 1852.

SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That the petition for a writ of *habeas corpus* must be in writing, and be sworn to and signed by the prisoner, or some person on his, her, or their behalf, setting forth the facts concerning his, her, or their imprisonment, and in whose custody he, she, or they are detained, and shall be accompanied by a copy of the warrant or warrants of commitment, or an affidavit that the said copy had been demanded of the person or persons in whose custody the prisoner or prisoners are detained, and by him or them refused or neglected to be given.

SEC. 2. Upon the presentation of the foregoing petition to any court having jurisdiction, the writ of *habeas corpus* shall be awarded, unless it shall appear from the petition itself, or the documents annexed, or the showing of the petitioner, the party so applying would not be entitled to any relief.

SEC. 3. The writ of *habeas corpus* may be allowed by the supreme, district, or probate court, or any judge thereof, and may be served in any part of the Territory.

SEC. 5. When the writ shall be awarded, it shall appear under the seal of court issuing the same, or if it be issued by any judge, it shall be signed by him, and shall be substantially in the following words, to wit:

TERRITORY OF UTAH, }
County of ———. }

To the marshal, or sheriff, officer, or to A. B., (as the case may be):

You are hereby commanded to have the body of C. D., by you detained as alleged, before the court or before me, E. F., judge, etc., (as the case may be,) at ———, on ———, or forthwith after being served with this writ, to be dealt with according to law, and to abide such order as the court or judge shall make in the premises, and have you then and there this writ, with a return of your doings in the premises.

SEC. 7. To the intent that no officer, sheriff, jailor, constable, or other person or persons whatsoever upon whom such writ shall

be served, may pretend ignorance thereof, such writ or copy thereof shall be endorsed with the following words: "*By the habeas corpus act*," and all persons upon whom such writs shall be served, holding said prisoner or prisoners, shall make return of such writ, and shall bring or cause to be brought the body or bodies of such person or persons before the court or judge issuing said writ, according to the requirements of the same.

SEC. 9. The writ may be served by the officer, or by any other person appointed for that purpose by the court or judge by whom it is issued or allowed. If served by any other person than the officer, he possesses the same power and is liable to the same penalty for a non-performance of his duty as though he were the officer.

SEC. 10. The proper mode of service is by leaving the original writ with the defendant or person holding or detaining such plaintiff or prisoner, and preserving a copy on which to make the return of service.

SEC. 15. The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had the plaintiff under his control and restraint, and, if so, the cause thereof. * * *

SEC. 18. * * * If no sufficient, just, legal cause of detention is shown, the plaintiff must be discharged.

SEC. 19. Upon the return of any writ of *habeas corpus* the court or judge shall, after having given sufficient notice, proceed in a summary manner to settle the said facts by hearing the testimony and arguments, as well of all parties interested civilly, if any there be, as of the prisoner or prisoners, and the person or persons who held him, her, or them in custody; and shall dispose of the prisoner or prisoners as the case may require, in all cases where the imprisonment is for a criminal offence, and there is not sufficient cause for discharge; and, although the commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court may make a new commitment, or admit the party to bail, if the case be bailable.

Compiled Laws of Utah, pp. 370–1–2–3–4.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1235.

RUDGER CLAWSON, appellant,
vs.
THE UNITED STATES, appellee.
} Assignments of Errors.

The appellant, having appealed to the Supreme Court of the United States, assigns errors herein as follows:

The supreme court of Utah erred in this:

1st. In not holding the appellant entitled to bail, and in not directing bail to be taken and appellant discharged.

2d. In treating the case as one for the review of the exercise of the discretion of the district judge instead of an original case depending on the exercise of the discretion of the supreme court itself.

3d. In refusing and omitting to exercise its discretion as to whether the appellant should be bailed or not.

4th. In assuming that the district judge had exercised a discretion in refusing bail, whereas it appeared, that said judge had not exercised any discretionary power, but refused the bail on an erroneous interpretation of the law by holding that the appellant must show and had not shown some extraordinary reason as a condition precedent to the exercise of discretion upon the question.

The judgment herein having been rendered without any written opinion, a more specific assignment of errors cannot be made.

F. S. RICHARDS,
Counsel for Appellant.

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No. 1235. *October Term, 1884.*

Supreme Court of the United States.

RUDGER CLAWSON,
APPELLANT,

VS.

THE UNITED STATES,
APPELLEE.

Appeal from the Judgment on a Writ of Habeas Corpus of the Supreme Court of the Territory of Utah.

BRIEF OF ARGUMENT FOR APPELLANT.

FRANKLIN S. RICHARDS,
WAYNE MacVEAGH,
For Appellant.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

Supreme Court of the United States.

October Term, 1884, No. 1235.

Rudger Clawson, Appellant,	Appeal from the judgment on a writ of *habeas corpus* of the Supreme Court of the Territory of Utah.
vs.	
The United States, Appellee.	

APPELLANT'S BRIEF.

On the twenty-fifth day of October, 1884, in the District Court for the third judicial district of Utah Territory, the appellant was convicted of the crimes of polygamy and unlawful cohabitation under sections one (1) and three (3) of an act of Congress, entitled "An act to amend section 5352 of the "Revised Statutes of the United States, in reference to big-"amy, and for other purposes," approved March 22d, 1882."

From the conviction and judgment thereon the appellant appealed to the Supreme Court of the Territory of Utah, perfected the appeal, *and obtained from the judge who presided at the trial, a certificate of probable cause, under the provisions of law hereinafter quoted; which certificate was duly filed and served on the United States marshal, and which certificate, under the law of Utah, stayed the execution of the judgment.*

The appellant then applied to the judge of the District Court who presided at the trial, and who had granted the certificate of probable cause, to be admitted to bail pending the decision of his appeal to the Supreme Court of the Territory. This application was refused November 3d, 1884, upon the grounds stated in the opinion and decree, as follows:—

"The court having passed its sentence herein upon the de-
"fendant, the defendant now moves that bail be fixed pending
"the appeal herein, and the motion is argued by counsel, and the
"court having now considered the same, and the court being of
"opinion that the defendant ought not to be admitted to bail
"after conviction and sentence *unless some extraordinary reason*
"*therefor is shown*, and there being no sufficient reason shown
"in this case, it is ordered that the motion and application for
"bail be and the same is hereby denied, and the defendant re-
"manded to the custody of the United States marshal."

The appellant was accordingly sent to prison, notwithstanding the pendency of his appeal and the certificate of probable cause, upon the sole ground that he had not shown *any extraordinary reason* in support of his application to be admitted to bail, *the court refusing to exercise any discretion as to whether his attendance could be secured at the decision of his appeal by bail or not.* Finding himself therefore practically undergoing sentence for his alleged offense, although his appeal had been duly perfected and although it had been certified by the judge who presided at his trial, that there was probable cause therefor, the appellant, November 10th, 1884, sued out a writ of *habeas corpus* as an original writ from the Supreme Court of the Territory, alleging that such imprisonment was illegal; *that he was entitled to the exercise of a judicial discretion in the matter of the bail he offered to give*, and offering to give such bail as the Supreme Court might direct. The writ was issued and directed to the marshal, and for return thereto the marshal set out the opinion and decree of the District Court of November 3d, 1884, hereinbefore set out at length. The Supreme Court of the Territory dismissed the writ and remanded the petitioner to the custody of the United States marshal, and, though the grounds of this decision were not filed of record at the time,

they subsequently appeared in the West Coast Rep., vol. 4, No. 9, page 417, as follows:—

"SUPREME COURT, TERRITORY OF UTAH, EX PARTE CLAWSON.

"The court, per Twiss, J., remanded the petitioner to cus-
"tody, announcing, *ore tenus*:—

"1. After conviction for a public offense, and sentence of
" imprisonment pronounced thereon, a defendant is not en-
" titled as of right to bail pending an appeal by him from the
"judgment, but the matter of admission to bail in such cases
"is discretionary, even though a certificate of probable cause
" for the appeal has been granted, and where the court in which
" the conviction was had, has, *in the exercise of his discretion*,
" refused to admit a defendant to bail, the court will not re-
"vise such action where it was not plainly to be seen that the
" *discretion thus exercised* had been abused.

"2. The court is not prepared to say, in view of section 360
" of the criminal practice act, that the defendant can be re-
"leased on *habeas corpus*, upon the giving of bail, as a con-
" sideration of this question would involve a review of the
" ruling of the District Court ordering the defendant into cus-
" tody, pending the appeal, and it is doubtful if this review
" can be had under the writ of *habeas corpus*, which is not a
" writ of review, and confers no appellate jurisdiction."

This opinion, it will be seen, treats the original writ of *habeas corpus* issued out of the Supreme Court of the Territory as if it was really an appeal from the decision of the court below instead of being a method of testing the sufficiency of the return made by the marshal; and, in the second place, it presumes, notwithstanding the explicit language of the return, that the court below exercised a judicial discretion as to whether the appearance of the defendant could be reasonably secured or not by bail, whereas the return plainly says that that court had refused the application upon the distinct ground that notwithstanding the offense was a misdemeanor, and a certificate of probable cause had been given which suspended by the express terms of the statute the execution of the judgment, it was nevertheless compulsory upon the defendant to furnish

some extraordinary reason why he should be admitted to bail. The judge below had held that no discretion should be exercised, but that the appellant must remain in custody, unless, as a condition precedent to the exercise of discretion, and as a basis for its exercise, he can show some extraordinary reason which should be sufficient for the judge to consider, and grant or refuse bail according as he considered the extraordinary reason sufficient or insufficient. In short, the district judge declined to exercise any discretion upon the subject, because no extraordinary reason calling for the exercise of such discretion had been shown.

And yet the Supreme Court of the Territory, with this decision distinctly before it, insists upon presuming that the District Court had exercised its discretion, and that the writ of *habeas corpus* was to be treated, not as an original writ to determine the validity of the cause of commitment, but as an appeal from the judiciary discretion of one tribunal to the judiciary discretion of another.

From this last and equally extraordinary decision by the Supreme Court of the Territory the present appeal was taken to this court.

Appeals are allowed in all criminal cases from the District Courts to the Supreme Court of the Territory.

Laws of Utah, 1878, page 137.

The act of Congress entitled "An act in relation to courts "and judicial officers in the territory of Utah," approved June 23d, 1874, provides that "a writ of error from the Supreme "Court of the United States to the Supreme Court of the "Territory shall lie in criminal cases, where the accused shall "have been sentenced to capital punishment or convicted of "bigamy or polygamy."

Supplement to Rev. Stat. U. S., vol. 1, 1874–5, page 108.

Sections 366 and 367 of the criminal code of Utah, approved February 22d, 1878, read as follows:—

SECTION 366. "An appeal to the Supreme Court from a judg- "ment of conviction stays the execution of the judgment,

"upon filing with the clerk of the court in which the convic-
"tion was had, a certificate of the judge of such court, or of
"a justice of the Supreme Court, that in his opinion there is
"probable cause for the appeal, but not otherwise."

SEC. 367. "If the certificate provided for in the preceding
"section is filed, the sheriff must, upon being served with a
"copy thereof, keep the defendant in his custody without exe-
"cuting the judgment and detain him to abide the judgment
" on appeal."

The following are the only provisions of the Utah law relating to bail applicable to this case:—

SECTION 386. "A defendant charged with an offense punish-
"able with death cannot be admitted to bail, when the proof
" of his guilt is evident or the presumption thereof great. The
" finding of an indictment does not add to the strength of the
"proof or the presumption to be drawn therefrom."

Laws of 1878, page 142.

SEC. 387. "If the charge is for any other offense he may
"be admitted to bail before conviction as a matter of right."

Id., page 142.

SEC. 388. "After conviction of an offense not punishable
"with death, a defendant who has appealed may be ad-
"mitted to bail: 1. As a matter of right when the appeal is
"from a judgment imposing a fine only. 2. As a matter of
"discretion in all other cases."

Id., page 142.

SEC. 401. "In the cases in which the defendant may be
"admitted to bail upon an appeal, the order admitting him to
"bail may be made by any magistrate having the power to
"issue a writ of *habeas corpus*."

Id., page 146.

The appellant assigns errors as follows:—

The Supreme Court of Utah erred in this:—

1. In not holding the appellant entitled to bail, and in not directing bail to be taken and appellant discharged.

2. In treating the case as one for the review of the exercise of the discretion of the district judge instead of an original

case depending on the exercise of the discretion of the Supreme Court itself.

3d. In refusing and omitting to exercise its discretion as to whether the appellant should be bailed or not.

4. In assuming that the district judge had exercised a discretion in refusing bail, whereas it appeared that said judge had not exercised any discretionary power, but refused the bail on an erroneous interpretation of the law by holding that the appellant must show and had not shown some extraordinary reason as a condition precedent to the exercise of discretion upon the question.

The counsel for this appellant desire to impress upon this Honorable Court the extreme gravity and importance of the question presented for decision by this record. The fact that it is a novel and startling departure from a substantially unbroken course of judicial precedent, would not of itself be conclusive proof of its unsoundness. Nor is it permissible, perhaps, in this proceeding to suggest motives for the change of procedure in question. It has often happened in judicial history, that prosecuting officers and judges have persuaded themselves that it was far better in the public interest to punish the persons they esteemed deserving of it before final judgment than afterwards, and if the judgment in this case is affirmed by this court, it will not only confer upon such officials the power to do this, but it will in effect annul the act of Congress granting the privilege of an appeal to the citizens of our Territories. Such is, no doubt, one of the objects of the decision, for it is quite plain that it would be sheer mockery of an unfortunate person who believed he had been illegally convicted to tell him that he had the right to bring the legality of his conviction in review before this court, but the price of his doing so, although there might be probable cause for such appeal, was the certainty that he would undergo at least all the punishment pending his appeal which would be inflicted if he did not take any appeal, and if his appeal was decided against him, he would have secured for himself double the punishment he would have received, if he had submitted himself to the deci-

sion of the inferior court. It is not therefore the case of Rudger Clawson alone, but of every citizen of the United States in the Territory of Utah, and presumably in every other Territory, which is now presented for decision, and if any doubt existed upon the proper construction of the statute of Utah requiring the exercise of a judicial discretion upon the question of bail after conviction for a misdemeanor, and after the granting of a certificate of probable cause for appeal, this court would, if possible, sedulously avoid any construction of that statute, the practical effect of which would be to utterly destroy the right of appeal guaranteed to the citizens of the Territory by the Congress of the United States. If that right is to be preserved against the encroachments of the judicial officers of the Territories, no better case for its preservation can be offered than the present. The accusation against the defendant is that he is guilty of a misdemeanor. The commission of such an offense in Utah cannot give rise to any presumption that the accused would be likely to become a fugitive from justice. There is no pretense that any attempt to escape has been made or is apprehended, nor can it be alleged that in the entire history of the Territory, any person accused of this offense has ever forfeited his bail, or failed to respond to the demand of the constituted authorities upon him. In addition to all this, the method of his trial and conviction is so clouded with doubt that the presiding judge, with the consent of the prosecuting officer, grants a certificate that there is probable cause for believing that his conviction will be reversed for illegality. If, therefore, he can be compelled to serve out his sentence of imprisonment really, though not technically, before an appeal under such circumstances can be determined, the right of appeal itself becomes a delusion and a snare, and the statute granting it will henceforth stand in "mock and "not in mark." In such an event, all right-minded persons ought to unite in desiring that Congress ought promptly to repeal the statute itself.

As mere matter of law, however, it is respectfully submitted that the decision of the Supreme Court of Utah in refusing to

admit the prisoner to bail pending his appeal was based on mistaken views of the law, and should be corrected by this court. It is believed that the nature of the offense of which the prisoner was convicted, the practice of courts as to bail in offenses of that grade, and the proper interpretation of the laws of the Territory of Utah relating thereto, unite to support the position of the appellant.

In the first place, it is clear that there is nothing in the nature of the prisoner's alleged offense which precludes his being admitted to bail. Polygamy is defined and punished by act of Congress of March 22d, 1882 (Statutes of U. S., 1881–82, page 30), where it was made a penal offense, but is not declared to be a felony. In the absence of an express statutory declaration making it felony, it must be considered a misdemeanor. Felony has been authoritatively defined as "any "offense which by the statutes or by the common law is pun- "ishable with death, or to which the old English law attached "the total forfeiture of lands or goods, or both, or *which a* "*statute expressly declares to be such.*"

1 Bishop on Criminal Law (6th edition), sections 615, 622.

Now by the common law all offenses, though they may be capital felonies, are at least bailable in the discretion of the court, while in misdemeanors, differing from felonies, the prisoner is ordinarily entitled to bail as of right, and the question of guilt is only material as affecting the amount of bail.

1 Bishop on Criminal Procedure, sections 256 and 260.

And the American doctrine is that bail shall be allowed generally if the appearance of the defendant can be thereby secured.

1 Bish. Crim. Proc. (2d edition), section 262.

This, of course, entitles to bail a prisoner whose offense is a misdemeanor, since, by all authorities, bail can in such a case be made sufficient in amount to guard against the temptation to escape.

The reasoning which forms the basis of the above rule applies as well to bail after conviction and pending appeal, for until final judgment it cannot be known that the prisoner is guilty.

Bail after sentence is allowed in England by recent statutes, and by many if not most of our States.

Id., section 254.

The grounds for the exercise of the discretion of the court as to admitting to bail before conviction were, the nature of the offense, and the probability of guilt. If the offense was a felony and punishable with death, bail was refused because it was supposed the felon would escape if he could.

Id., section 255.

Under the statute of Utah, and like statutes, the grounds on which the discretion as to admitting to bail should be exercised after judgment must be the nature of the offense, the penalty, and the probability of the defendant's appearance being secured by the bail bond.

The punishment for this offense is less severe than that formerly prescribed in England for many misdemeanors, and, with the increased facilities of modern times to apprehend those fleeing from justice, the chances of escape from bail are greatly lessened. The offense in Utah is less heinous in one respect than the offense as usually committed elsewhere. Ordinarily the offense is directly against the woman taken as a polygamous wife, as well as against society. In Utah such marriages are voluntarily contracted by the woman with full knowledge of the situation, and there is in it no element of force, fraud, or deception.

Even if the presumption of innocence ceases with the conviction, this is not the only element in the consideration. By the Utah statute offenses punishable by a fine, however large, are bailable as of right, and in this case the certificate of probable cause for the appeal modifies the effect of the judgment and should itself entitle the appellant to bail. The only object of close custody pending the appeal is to secure the presence of the defendant to abide the sentence if the appeal is unsuccessful. Close custody does not absolutely insure this, for the jail may burn or the prisoner be rescued or escape. We contend that the question for the court to consider in such cases is whether the appearance of the prisoner can be secured, to a reasonable certainty, by

bail, and that the nature of the offense, the penalty, the standing of the party, and all the circumstances attending the case and party should be considered. In this case the appellant was on bail from the time of his arrest till the time of his sentence—a period of many months, and it was not alleged that he made any attempt to escape, either before or after conviction; nor can it be pretended that any other person charged with or convicted of a like offense and on bail in Utah ever attempted to escape. The appellant offered to give bail in any sum the court might fix, and there can be no reasonable doubt that his appearance could be thus secured. The condition of things in Utah, and probably other Territories, requires a liberal construction of the law relating to bail. *As in offenses against the United States the Penitentiary is the only prison over which the United States marshal has any jurisdiction, and as the appellant is not and could not under the law be sentenced to labor, he is subjected by detention now to the same punishment and in the same place, as if held under and in execution of the senteuce.* If the judgment is finally affirmed he will be practically subjected to double punishment, because his case cannot be heard on its merits in this court for several months and might not be heard for several years, and no part of his imprisonment pending the appeal need be credited on the term for which he was sentenced. If the judgment should be reversed, then manifestly he will have been unjustly punished by this imprisonmant. His appeal, instead of being a boon to him, will rather prove a burden, and he had better submit at once to the judgment of the *nisi prius* court, however illegal and unjust it may be, than to stay the judgment and prosecute his appeal to this court. Certainly Congress did not intend, when it gave the right of appeal in such cases, that it should operate as an injury rather than a benefit to the appellant; and no construction should be given to any Territorial statute which would work such a hardship, and thus in effect render nugatory the benefits which Congress intended should accrue from the appeal. In other words, the Territorial law should be so construed as to give full force to the act of Congress, and protect the appellant from punishment, in effect as well as in name, until his case has been reviewed by this court.

It is well known that bail has been allowed in Utah pending appeal, ever since the organization of the Territory in 1850, in all except capital cases; and, under the same statute now in force, in every case of bigamy or polygamy heretofore prosecuted in the Territory. Indeed it has been the universal practice in said territory, and the usual practice in New York and in California, until some recent decisions, to admit to bail in such cases.

Ex parte Hoge, 48 Cal., 3; People *vs.* Folmsbee, 60 Barb., 480.

The Supreme Court of Utah is authorized to issue writs of *habeas corpus*, and it also has appellate jurisdiction from the judgments of District Courts on *habeas corpus*. This was, however, *an original writ* in *the Supreme Court*, calling upon that court to determine the case on the facts shown. The court treated it as a proceeding to review the exercise of a discretion on the part of the district judge, and refused relief on two grounds: That the court would not revise the action of the court below when it did not appear that the discretion of that court had been abused; and also that the court would not say defendant was entitled to bail, because that would require a review of the decision of the court below, and it was doubtful whether the review could be had by writ of *habeas corpus*. We submit that the question for the court was whether, *in its judgment*, the appellant should be admitted to bail, and that it was not incumbent on appellant to show that the discretion of the judge below had been abused.

It is manifest from the opinion of the court that it has omitted entirely to determine the case on the merits, and to decide on its own judgment as to what should be the rule in such cases, but on the contrary has treated the case as one for review and respecting which the appellant should show error in the court below.

The court assumed that the district judge had exercised a discretion which was sought to be reviewed. It will appear from the commitment that no such exercise of discretion had taken place. The judge below held that no discretion should be

exercised, but that the appellant must remain in custody, *unless, as a condition precedent to the exercise of discretion, and as a basis for its exercise, he can show some extraordinary reason for admission to bail.*

It ought to be stated that this construction of the statute seems to be supported by the opinion of Judge Wallace in *Ex parte* Marks, 49 California, 680, and of the same judge in *Ex parte* Smallman, 54 California, 35; but we contend that it is an erroneous construction. The statute gives bail as a right when the penalty is a fine, and when the penalty is imprisonment the question is one of discretion. It is to be observed that the two classes cover all cases, and the law assumes that the judge will exercise a discretion in all cases in the second class. It does not assume that the discretion in the second class of cases can only be exercised in exceptional cases, where the defendant can show some extraordinary reason, and that the power to exercise this discretion is dormant until, in such rare cases, its exercise on the sufficiency or insufficiency of the extraordinary reason is invoked. On the contrary, it assumes the continuous power and right to exercise this discretion in the entire class of cases, and necessarily it must be exercised on the case as it exists when the appeal is taken upon the same general grounds that apply to cases before judgment, except as the additional probability of guilt may affect the amount of bail.

Had the legislature intended the construction which the prosecution claim for it, the law would have been made to read that, in cases punishable by imprisonment, bail should not be taken unless on facts shown extraordinary in their nature. The fact that the Utah courts have acted under this statute nearly seven years without ever before giving it such a construction, is a significant fact which tends to negative the idea of such legislative intent, for had it been so intended there has been ample opportunity, by amendment, to give the law such effect. Until very recently there has been entire acquiescence in the liberal construction given the statute by the courts, and no effort has ever been made by any one to have it changed. We submit, therefore, that it has been clearly

shown that it was not intended to limit the action of the court within such narrow bounds, and we submit that the reasoning of Judge Wallace in the California cases is inapt and erroneous; that the appellant was entitled to the judgment of the court on his case as it existed, and that there is no sanction in the law for imposing upon a defendant, who presents a certificate of probable cause for his appeal, the additional and impossible burden of showing some other and extraordinary reason why he should be admitted to bail pending the decision of the question whether or not he has been legally convicted of a misdemeanor.

Indeed, the reasoning of Judge Wallace in *Ex parte* Marks, *supra*, may itself be shown to require a conclusion different from that which he reached. While in the act of arbitrarily determining that a law granting a stay of execution on appeal necessarily relieved him of the duty of exercising a sound discretion on the merits of an application for a release on bail, and by implication repealed a prior law which, according to his own decision (*Ex parte* Hoge, 48 Cal., 3), gave the prisoner the right to that discretion and to a release on bail, he admitted that injustice would be done the prisoner if, on a bailable charge, he should be actually punished before the court of last resort should declare him to be liable to punishment. This of itself would forbid an incarceration or confinement of the defendant not in execution of sentence, when he could with legal safety be admitted to bail. It is idle to say that the confinement of the prisoner is not punishment simply because execution of sentence is stayed. The defendant suffers by it the same inconveniences, the same losses, the some social disgrace as though he were serving his time under sentence, added to which is the palpable injustice that will have been done him by restraining him of his liberty if the decision of the Territorial court be reversed, and of inflicting upon him a double term of confinement if the decision be affirmed.

But we are not left to the necessity of showing, without direct authority to support us, the true construction of the law of Utah in question, and the error of Judge Wallace in his interpretation of the statute of California.

If it be said that the Utah statute is borrowed from California, it may likewise be said that the statute of California is borrowed from New York, and the Supreme Court of New York has construed the provision now under consideration in favor of the right to bail after conviction, holding that the court, in the exercise of its discretion, will look into the nature and circumstances of the case, and that the stay of proceedings is of itself sufficient indication of error to induce the court to allow bail.

People *vs.* Folmsbee, 60 Barb., 480.

Said the court in this case: "I do not think the provisions of "the law which confers on a party the right of reviewing his "trial and sentence, were intended as a sham and mockery; nor "should those provisions be so construed as to permit a minis- "terial officer to nullify their just and humane purpose. *So I "think the right to let to bail should accompany the right to and "allowance of a stay of proceedings on the judgment in all cases "and under all circumstances where a direction for such stay is "authorized, excepting always capital cases.*"

It is believed that this decision presents at once the law and the substantial equity of the case now presented for decision. A reversal of the decision of the court below and an order that the appellant shall be admitted to bail cannot result in any injustice to anybody, while its affirmance might result in gross injustice to the appellant by punishing him as for a grave crime for exercising his right of appeal to this court by sentencing him to a long term of imprisonment for appealing, although the judge who tried him certified that there was probable cause for his appeal. It is confidently submitted that this Honorable Court will not approve a construction of the law of Utah which leads to results so manifestly unjust and oppressive.

In the conviction that the present case will receive the attention it deserves, and that the Constitution as well as the statutory right of the citizen to give bail in offenses of this kind will be reaffirmed, the petitioner confidently awaits the decision of this Honorable Court.

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For Appellant.

114-477

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In the Supreme Court of the United States

OCTOBER TERM, 1884.

CLAWSON
v.
THE UNITED STATES. } No. 1235.

BRIEF FOR THE UNITED STATES.

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The record shows that Clawson was convicted of bigamy, &c., in a district court of Utah Territory; that he appealed to the supreme court thereof, receiving thereupon a certificate of "probable cause," under a Utah statute; that he also applied to the court before which he was tried for bail, pending the appeal; that this was refused; that thereupon he applied to the supreme court of the Territory for bail under *habeas corpus;* that this also was refused, and that finally he *appealed* to the Supreme Court of the United States.

The Utah statutes defining the effect of the certificate of probable cause when given on appeals in criminal cases, and also the rights of parties convicted to bail pending appeals by them, are to be found in the brief of the learned counsel for Clawson.

The objections to the relief applied for in this court seem to be as follows:

1. The record is brought here by *appeal*, instead of *writ error*.

This objection cannot be *waived*. (U.S. v. Emholt, 105 U. S., 414, and cases cited therein.)

2. Relief by *habeas corpus* in a superior tribunal from the *effect* of a judgment given in an inferior tribunal *upon its discretion*, is inadmissible; for such relief would plainly be an evasion of the principle that an *appeal* from the judgment itself is inadmissible.

3. That the court which had tried Clawson would not admit to bail because no "*extraordinary* reason" was shown therefor, does not indicate that it refused to exercise its official discretion upon that application, but that it did exercise it, and had a certain rule therefor. With such rule, unless plainly unreasonable, no superior tribunal can have to do.

Besides, that rule is reasonable. The words are to be taken in their ordinary meaning and without emphasis. So read they mean no more than that the Utah statute (brief of learned counsel, p. 5, sec. 388), requires that convicts in close custody take upon themselves the *onus probandi a fit case for bail*; that something more should be shown, probably, than that the offense charged is itself of small consequence in the eye of the law; "something," for instance, which grows out of the *special* features of the very case. "Special" means *not ordinary*, *i. e.*, *extraordinary*. The trial court therefore said in

effect that the applicant had shown no special reasons for the relief which he asked for.

3. It is apparent upon the face of the petition that the proceedings in this case in the Supreme Court of Utah were meant as a sort of appeal. For the petition sets forth the refusal *below*, and alleges that the existing imprisonment is "illegal," which it could not be unless the order made upon the application below was null, or erroneous and in *effect was complained of*.

However, supposing that section 401 of the Utah statute, (brief &c., p. 5,) allows of *repeated* applications upon the same state of facts to various magistrates, and that *this* application is to be treated as only a *second* application (*that* to the trial court being virtually a *first*), then the present "appeal" is itself an appeal from an exercise of judicial discretion. The record shows no more than a refusal of an application *to the discretion* of the Supreme Court.

Besides, if the supreme court of Utah were acting merely in the capacity of a "magistrate," under section 401 (even allowing that as a court it might do this), the act of June 23, 1874 (Rich. Supp., p. 108), allowing a writ of error from the court "to the supreme court of the Territory" in cases where the accused shall have been convicted of bigamy, does not apply. For that, as is submitted, the supreme court of Utah must have acted *as such*.

S. F. PHILLIPS,
Solicitor-General.